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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1945**

**No. 391**

**LEWIS E. NASH,**

*Petitioner,*

*vs.*

**PETER RAUN**

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT AND BRIEF IN SUP-  
PORT OF PETITION.**

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*To the Honorable Harlan Fiske Stone, Chief Justice of  
the United States and the Associate Justices of the  
Supreme Court of the United States:*

Your petitioner respectfully shows:

**Summary Statement of the Matter Involved**

This is an action at law brought in the United States District Court for the Western District of Pennsylvania by Lewis E. Nash, plaintiff, petitioner herein, against Peter Raun, defendant, respondent herein, for damages arising as a result of the negligent operation by respondent

of his truck which collided with an automobile operated by petitioner on October 9, 1941, in the County of Erie, State of Pennsylvania. The accident occurred at the intersection of Route 89 with Station Road. Route 89 is a through highway running in a northerly-southerly direction. Station Road is a highway running in an easterly-westerly direction. The petitioner had come from Chautauqua, New York, and was going to the site of his employment in the City of Erie, Pennsylvania. He was proceeding westwardly on Station Road. The respondent was driving an International truck, the weight of which, including a load of empty and filled milk cans, totaled Six Thousand Two Hundred (6,200) pounds (R. 111). The respondent was driving in a northerly direction on Route 89 (R. 111). The front end of the respondent's International truck ran into the left middle side of the petitioner's Chevrolet touring car, pushing the said Chevrolet car ahead of it in a northerly and westwardly direction. The International truck proceeded on north on Route 89, turned completely around, tipped over, and slid on its left side about Twelve (12) feet to the north (R. 124). The petitioner's Chevrolet touring car landed in a ditch on the west side of Route 89, approximately Forty (40) feet from the place where it was struck.

At the point of intersection, the construction of Route 89 across Station Road is such that it creates a hump hazard to travel from the east on Station Road making it impossible for an automobile going west on Station Road to cross Route 89 at a rapid rate of speed. (See photo, Defendant's Exhibit "C" printed as an Appendix hereto.)

Witnesses on behalf of the petitioner, who live about Three Hundred (300) feet from the intersection, testified that they heard a loud crash about 7:30 A. M. (R. 26). Upon proceeding to the scene of the accident they found petitioner's car standing upright in a ditch paralleling the

west side of Route 89 about Twenty-five to Thirty (25-30) feet north of Station Road and facing the intersection (R. 12). The center part of the left side of the car was crushed (R. 13). The front door on the right side was open, and the front seat and the contents were outside the car. There was no damage to the front of the car (R. 13). The headlights were lit and the engine running (R. 28). Petitioner was lying a few feet back of the car with his head in the ditch and his feet on the embankment. He was unconscious and apparently severely injured (R. 14).

Respondent's truck was also on the west side of Route 89 about Twelve (12) or more feet north of petitioner's car (R. 15). The truck was lying on its side with its engine facing south toward the intersection. The front fenders were somewhat damaged and the middle of the front axle was Four (4) inches in front of the wheels and was bent in the shape of a bow (R. 16; R. 25). Milk cans carried on the truck were scattered over the road.

There were tire marks on the right side of Route 89 approaching the intersection which were visible for about Thirty (30) feet from the center line of the intersection (R. 18). The marks were such as would be made by the skidding of a tire over a concrete surface (R. 19). There were other tire marks beginning about the center of the intersection and running in the direction of the petitioner's car where it rested in the ditch. They were not too distinct, about Five (5) or Six (6) inches wide, and of a "wavy" nature (R. 20).

(The last three paragraphs were taken directly from the Opinion of the Circuit Court of Appeals filed May 14, 1945.)

The visionary hazard was increased at the time of the accident by a fog which reduced the range of vision to

"from 5 to 6 feet". This fog is specifically testified to by witness Margaret Jones. Her testimony appears on Page 33-A of the record and is as follows:

"Q. How far were you from the Nash (petitioner's) car when you were first able to distinguish it was an automobile?

"A. Oh, a few feet.

"Q. Well, how many?

"A. Five or six."

Peter Raun, the respondent, admitted that he was driving at the rate of 25-30 miles per hour at the time of the collision (Page 112-A of the record).

The trial was by jury. A verdict and judgment were rendered in favor of petitioner against respondent for Thirteen Thousand Five Hundred (\$13,500) Dollars (R. 180). An appeal from said judgment was taken by Peter Raun, respondent, to the United States Circuit Court of Appeals for the Third Circuit, which Court reversed the judgment of the District Court.

The principal questions involved on said appeal as enumerated in the brief of the respondent filed in the United States Circuit Court were:

1. Was there sufficient evidence upon which to conclude that the respondent was guilty of negligence?

The Court below answered "Yes."

2. Did the petitioner present a case free of contributory negligence?

The Court below answered "Yes."

Petitioner here submits that the only legal question of merit involved in the record may be stated as follows:

Can a citizen driving a car at the rate of 25-30 miles per hour in a fog which reduces visibility to from Five to Six feet not be guilty of negligence per se?

### **Jurisdictional Statement**

It is contended that the Supreme Court of the United States has jurisdiction to review the judgment here in question because the Circuit Court's reversal of the Trial Court's judgment was a denial of the petitioner's right of trial by jury guaranteed to him by Amendment 7 of the United States Constitution.

Secondly, because the respondent's failure to comply with Rule 50 of the United States District Court, wherein the respondent filed a motion for a directed verdict but did not file any specific reasons therefor, should have been construed in the United States Circuit Court as a waiver of his right to press the motion for directed verdict.

Thirdly, because the respondent's motion for directed verdict was not properly before the Circuit Court of Appeals because the respondent neglected to comply with the specific requirements of Rule 75 of the Circuit Court of Appeals. The petitioner, under this rule, was entitled to notice from the respondent of a statement of the points on which the respondent intended to rely on the appeal.

Fourthly, because the decision of the Circuit Court of appeals reversing the District Court is in direct conflict with decisions of the Supreme Court of Pennsylvania, decisions of other United States Circuit Courts of Appeals and decisions of the United States Supreme Court and in violation of the well-established legal principle that the testimony introduced for petitioner should be taken as true and viewed in the light most favorable to the petitioner; and that to secure reversal for refusal to give binding instructions the evidence supporting the verdict must be proved untrue by incontrovertible physical facts; and that all of the evidence supporting the jury's verdict must be considered true and that unfavorable rejected.



And, lastly, because the Circuit Court of Appeals refused to apply the specific Pennsylvania statutory definition of negligence; Act of Assembly 1925, May 1, P. L. 905, Article 10, Section 1002, as amended 1939, June 27, P. L. 1135, Section 23; 1941, April 15, P. L. 17, Section 10, and as reported in 75 Purdon's Pennsylvania Statutes Annotated, Section 501, which provides as follows:

“(a) Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed, not greater than nor less than is reasonable and proper, having due regard to the traffic surface, and width of the highway, and of any other restrictions or conditions then and there existing; and no person shall drive any vehicle, upon a highway at such a speed as to endanger the life, limb, or property of any person, nor at a greater speed than will permit him to bring the vehicle to a stop within the assured clear distance ahead.”

That the Pennsylvania Supreme Court and the United States Circuit Court of Appeals have often held that what is the assured clear distance ahead varies according to the visibility at the time of the accident and that a fog may be so dense on the highway that to proceed at any rate of speed is imprudent.

### **Questions Presented**

The questions herein presented are:

Was the petitioner denied the right of trial by jury by the Circuit Court's order reversing the District Court?

In reversing the District Court, can the Circuit Court refuse to consider testimony upon which the jury's verdict must have been based?

### **Reasons Relied On for Allowance of the Writ**

1. That petitioner was denied the right of trial by jury guaranteed to him by Amendment 7 of the United States Constitution.

2. That respondent's neglect to file specific reasons for his motion for directed verdict was in violation of Rule 50 of the United States District Court.

3. That respondent's failure to file notice in the United States Circuit Court of Appeals of a statement of the points upon which the respondent intended to rely on appeal was a violation of Rule 75 of the United States Circuit Court of Appeals.

4. That before the Circuit Court of Appeals can reverse the District Court and enter a judgment for respondent, testimony introduced for petitioner must be taken as true and viewed in the light most favorable to the petitioner, and that the evidence supporting the verdict must be proved untrue by incontrovertible physical facts.

5. That the Circuit Court of Appeals cannot, under the law and the Constitution, reverse the District Court and enter a judgment for the respondent.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 8601, Peter Raun, Defendant-Appellant, v. Lewis E. Nash, Plaintiff-Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States

Circuit Court of Appeals for the Third Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated August 28, 1945.

JOHN B. BROOKS,  
MAURICE J. COUGHLIN,  
*Counsel for Petitioner.*